IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22260

RICHARD WALTER BURTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Central District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to perform

work assignment, as ordered), Universal Military Training and Service Act [Tr. 24].[1]

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [Tr. 25].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to perform a work assignment, as ordered [Tr. 2].

Appellant pleaded "not guilty" and was tried by the Honorable W. J. Ferguson, District Judge, jury trial having been waived. Appellant was found guilty and sentenced to imprisonment for a period of three years [Tr. 24].

A written motion for judgment of acquittal was filed during the trial [Tr. 20].

FACTS

The facts are found in two places:

(1) The complete Selective Service System file (the government's exhibit) and

(2) The oral testimony, and defendant's exhibits (two photos).

1. Tr. refers to the Transcript of Record.

The essential parts of the written evidence shows:

On December 20, 1964, appellant filed his Classification Questionnaire (SSS Form No. 100) and answered all applicable portions. [Ex.* 4-12].

On October 21, 1965 he filed his Special Form for Conscientious Objection (SSS Form No. 150). [Ex. 18-23].

Although he was thereafter initially classified in Class I-A he was given the Class I-O classification he desired, at the time he met with the local board. [Ex. 11].

On May 19, 1966, he was mailed the form (SSS Form No. 152) that asks registrants so classified to nominate three types of civilian work that contribute to the national health, safety or interest that they feel best qualified to do. [Ex. 44].

He timely replied by filling in "SERIES II—APPLICATION FOR APPROVED EMPLOYMENT—If you have applied to an approved employer for civilian work contributing to the national health, safety, or interest, and he has accepted your application, indicate" as follows:

"Name of Employer—City of Los Angeles, Recreation Parks Dept. (Civil Service)

Address of Employer—Griffith Park zoo, L. A.
(Number & Street (City)

California
(State)

Type of Employment—Animal Keeper

*Ex. refers to the government's exhibit, the complete Selective Service System file of the appellant.

Remarks—As a civil service employee, I have a six month probation period to go through two of which are finished.

Richard W. Burton
(Signature of Registrant)"
[Ex. 44]

The local board's only reaction was to send the file to State Headquarters, asking, by its routine letter, for three types of work to submit to the registrant [Ex. 49].

Therefore, despite the many explanations by appellant of the valuable nature of his work, he was ordered to work in the Los Angeles County General Hospital and he refused. Prosecution followed.

At the trial the implicit suitability of his work choice was explicitly shown. This will be detailed in Argument, below.

QUESTION PRESENTED AND HOW RAISED

I

Was the rejection of appellant's choice of work arbitrary, unfair, and a denial of due process? This question was raised by the Motion of Judgment of Acquittal (CT 20-21).*

SPECIFICATION OF ERROR

I

The district court erred in failing to grant the Motion for Judgment of Acquittal.

*CT refers to the Clerk's Transcript of Record.

SUMMARY OF ARGUMENT

I

The Order to Report Was Invalid and No Conviction May Be Based On It, for each of the following reasons:

The local board deprived defendant of his elected civil work choice, contrary to law.

The order was based on an illegal abdication of its duty and responsibility by the local board, its order being an act based on a direction that usurped the authority of the local board and illegally controlled it.

The regulations, as interpreted and applied, conflict with the Act.

The Act, as construed and applied by the regulations, the local board and the State Director is unconstitutional because it deprives the defendant of due process of law contrary to the Fifth Amendment to the United States Constitution.

ARGUMENT

The Order to Report Was Invalid and No Conviction May Be Based on It.

It is clear that this appellant wanted to do civilian work contributing to the national interest, at all times.

It is also clear that he actually was in such work. Further, that all work done by him at all times thereafter, and currently, is work that he believed should be considered a contribution to the national interest, as distinguished from essentially money-making work.

The questions here are—

(1) Since the law gives the I-O registrant the option to initiate a request for assignment to three work choices of his selection must he choose only from those on an "approved" list, moreover an inflexible list compiled by the State Director?

(2) After the registrant responds to an invitation by his local board to initiate such a request may his choices be rejected with no more explanation than "it is not on the State Director's list"?

The statute* in essential part reads:

"(j) Conscientious objectors . . . shall . . . be ordered . . . to perform . . . such civilian work contributing to the maintenance of the national health, safety, *or interest as the local board may deem appropriate* and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title." (Emphasis supplied)

The applicable regulations (32 C.F.R. §§ 1660.1 *et seq.*) in essential parts read:

"1660.1 Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into

*UMT & S Act of 1951, as amended, §6(j), 50 USCA App. §456(j).

the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

* * *

(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Nowhere is there a specification that this work must be approved by the State Director or that he is to have an "approved" list. Congress and the President have made their intentions clear.

Appellant, by his own evidence, and by that of several zoo officials showed the nature of his work and of its value to the national interest.

An analysis of this evidence shows:

1. The testimony of Charles J. Sedgewick: "A. I am a Doctor of Veterinary Medicine. I am the clinician for the Los Angeles Zoo animals." [RT 27].* His work dealt with using macaque blood for human transfusions [RT 28] in connection with the Children's Hospital [RT 29]. "Mr. Burton is a highly qualified primate animal keeper and he makes it possible for me to have healthy animals so that this program could be taken care of" [RT 29] and "it requires great skills and certain innate capabilities, and

*RT refers to the Reporter's Transcript.

persons with Mr. Burton's background and capabilities are rather rare. We have a few working at the zoo in addition to Mr. Burton, but his skills are very worthwhile and desirable." [RT 30].

He further testified:

"There is another research activity that we just recently received which I understand is some federal grant money involved, anesthesia in all classes of animals.

Q. That is in connection with the pictures that we exhibited—

A. Yes.

Q. —A and B?

A. Yes.

Q. And is the defendant, Mr. Burton, a part of that work?

A. Yes. It is very necessary to have an experienced man, animal handler, because an animal, a very excited animal or an animal that is unduly stressed prior to innoculation will not give you the proper response. It is very important that the animals have the appropriate handler." [RT 33-34].

2. The testimony of Edward Alonso, Principal Keeper:

". . . he is an excellent employee. He handles himself quite well with the public." [RT 41].

* * *

"It is difficult really to find anyone that really is serious about one particular type of animals. Most of the people get a little bit tired of what they are doing and would prefer to transfer from one place to another. It is difficult to find a man that is extremely interested in one particular area. And not that this is just his sole—

Q. Do you mean that he is interested extremely in what he is doing now?

A. Yes. In animals generally, I am sure, but particularly in primates. He indicated this to me.

As an example, I tried to encourage him to take the last senior exam, due to the fact that he is not only qualified but he was also eligible due to the fact that he has some college experience.

And he wouldn't take it, the primary reason I think was because he indicated he would prefer to stay where he is. The promotion would mean that he would have to move to other areas, move over to another string

So this indicates to me that he wants to stay in the the area he is in, which is mainly dealing with primates. Some of the others are Asiatic and African mammals but primarily primates." [RT 43].

* * *

"I have examined the records—I do go by them daily. Richard on his own has taken a very active part in this and active to the extent that he has brought out things that—at least pointed out things to myself and to his direct superior, things that unfortunately neither he nor I were familiar with. His records are quite extensive, not only extensive but extremely good. I think they will be of great benefit to the zoo some day, and are at this present time." [RT 45].

4. Defendant testified he had examined the "approved lists" of the 56 (not 1956, as the reporter's transcript has it) State Directors and that some of them listed work with animals [Rep. Tr. 17].

On cross-examination it appeared (by arithmetic) that except for school and part-time furniture moving that all of his adult life was in work with animals [Rep. Tr. 20].

The above oral evidence from the four witnesses is what distinguishes this case from *Mang* v. *United States,* 9 Cir., 1964, 339 F.2d 369. In Mang the appellant delayed employment, although initially starting in satisfactory civilian work, "over sixteen months after he had quit" [370] and Mang did not present explicit evidence for the record that his work [with the Quakers] met the statutory requirements. Appellant Burton actually was established (as a probationer) in work, civilian work that met the statutory requirements.

The Act and the regulations place the responsibility for work selection on the local board. This responsibility must be met reasonably and fairly.

The local board may not arbitrarily reject the registrant's work choices, it must give a rational reason for its conduct, it must "build a record." *Dickinson* v. *United States,* 346 U.S. 389 (1953). [74 S. Ct. at 159].

The local board may seek information or advice from any source, and information or advice may be given to it by anyone.

The record however, shows an abdication of its prerogative and a shirking of its plain duty by the local board; also, and even less excusable, a usurpation of prerogative by the State Director.

"Outside influence" may be valuable, it may be harmless, or it may be considered binding. We contend this was so in this instance. "Binding" outside influence has been held to invalidate the "decision" of local boards in a number of different kinds of studies. Some instances are the following:

In *Talcott* v. *Reed,* 9 Cir., 1954, 217 F.2d 363, it appeared there had been interference with board action by Gen. Hershey's Operation Bulletin No. 57. The Director's action was disapproved:

> "We think the contents of the Bulletin are morally and legally wrong. It invades the most sacred precinct of family life at a time when there should be the most complete mutuality between the spouses and in the face of nature's most demanding and significant urge in nature's scheme for propagating the species. It obliquely charges the youth of the land with corrupting the family relation into a way of avoiding service for cowards." [363]

In *Tietz* v. *Gen. Abbott,* 1946, N.D. Calif. 66 F. Supp. 765, the use by the local board of the ". . . inadequate report of the [farm] Investigator . . ." was held to be basis for granting a writ of habeas corpus. [766]

In *Ex Parte Barrial,* 1951, S.D. Calif., 101 F. Supp. 348, a writ of habeas corpus (against the Marine Corps) was issued because there had been an invalid resolution by the local board, one ". . . contrary to Selective Service Regulation 1622.15 (a) (1) . . ." [349]. Although the opinion does not show why the board so rashly acted we represent to the Court that the record showed conclusively it was because of the State Director's SHQ #14 (a bulletin) that "informed" the boards they could disregard marriages contracted after the crossing of the 34th Parallel by North Korean troops.

In *Ashauer* v. *U. S.,* 9 Cir., 1954, 217 F.2d 788, one of the principal questions was whether the board was unduly influenced by the Department of Justice. This Court laid

down the rule to be followed, stating: ". . . there is nothing in the case which compels us to conclude that the board surrendered its right to reach its own judgment. . ." [791] The record in this appeal cannot meet this test.

In *U.S.A.* v. *Avery,* No. 27550(2), Eastern District of Missouri, November 27, 1953, we quote more lengthily because it is an unreported decision:

> "Defendant is entitled to the independent judgment of the local board in making his classification. We do not understand the local board is without power to classify a conscientious objector and that such classification can only result from the Attorney General's opinion. Yet defendant's Exhibit B carries with it this implication. If the defendant's classification as I-A on June 8, 1952, was in response to the letters from the Legal Officer of the State Headquarters and the Chairman, the defendant was deprived of a substantial right, namely the independent judgment on his classification by the local board."
>
> * * *
>
> "We are unwilling to base a conviction on presumptions and inferences in the face of testimony to the contrary. Therefore we are not convinced of the guilt of the defendant beyond a reasonable doubt.
>
> "Questions upon which we have a reasonable doubt are:
>
> (1) Was the act of the local board in putting the defendant in classification I-A in fact the act of the local board and not the result of acts of the State Selective Service office through the local board's misinterpretation of the meaning of defendant's exhibits B and C; and

(2) Was all of the information given to the local board orally at the August 12, 1952, hearing, substantially incorporated in written documents in the defendant's file and therefore no summary necessary?

"Our disposition of this case means the Government must start with its local board and proceed with the classification of this defendant as provided by the regulations, and conform to the regulations in every respect necessary to protect the substantial rights of the defendant in classifying him under the Selective Service System.

"ORDER

"The defendant is discharged.

/s/ Rubey M. Hulen
Judge"

In *Ex Parte Asit Ranjan Ghosh,* S.D. Calif., 1944, 58 F. Supp. 851, we have an excellent discussion of these State Director's directives by a district judge who had been a Selective Service official, the most thorough discussion of this subject known to counsel. In *Ghosh* a writ was granted, the court observing "And the State Director is not empowered under the Act to promulgate rules or regulations nor to substitute his judgment for that of the local or appeal boards." [857]

In *Levy* v. *Cain,* 2 Cir., 1945, 145 F.2d 339, the Court reversed an order where a writ had been denied. It appeared the local board had made use of a report by a panel of experts. The opinion, by Judge Learned Hand held that such use must be a restricted one, that ". . . they must not be made a substitute for the boards themselves." [341]

The Court concluded that the form of the recommendation made it improper for the board to act upon it; that ". . . it was a decision upon the very issue to be decided." [941]

The problem in our case seems akin to that decided by the court in *Glover* v. *U.S.A.*, 8th Cir., 1961, 286 F.2d 84. Glover had complained he had been reclassified ". . . by the reason of an unpublished directive to the local board from State Headquarters, the context of which was not generally circulated or made known. This directive, in turn, was based upon advice and recommendations contained in Operations Bulletin No. 123, as amended, from National Headquarters to State Headquarters. Said Bulletin was also unpublished, and was an interdepartmental communication publicly unobtainable." [89-90]

The court held "The maintenance of fair procedures is essential to the administration of justice. According to Congressional declaration (62 Stat. 605, 50 U.S.C.A., Appendix, § 415(c)), the overall operations of the Act and regulations pertinent thereto were designed to be fair and just. Under the circumstances here existing, the failure on the part of the local board to convey to defendant any reason or explanation for the repetitious fifth classification of I-A was contrary to our concept of fairness and basic justice." [90]

We believe the failure of Burton's local board to itself consider the merits of his work choices is contrary to the statute, the regulations, and to basic justice.

In *Eagles* v. *Samuels,* 67 S.Ct. 313 (1946), our argument by analogy is further supported. There, the Court stated: "It is plain that the local boards and the boards of

appeal may not abdicate their duty by delegating to others the responsibility for making classifications. That is their statutory function. Section 10(a) (2)." [319]

In *Eagles,* however, the Court decided that the city director [The New York City Director is the equivalent of a State Director] had ". . . submitted the panel's report *with* the admonition that it was advisory only *and that it was the board's responsibility* to make the classification. The recommendation of the panel was followed. But Samuels was subsequently given not only one but two hearings before the local board and a hearing before the board of appeal. *There is no indication either board relied solely on the panel's report or considered itself bound by it.* In fact both boards received additional evidence submitted by Samuels and considered it. The record does not bear out the suggestion that either board was a rubber stamp for the panel." [319-320] (Emphasis added)

This court, by implication, has already agreed with our argument. In *Tyrrell* v. *U. S.,* 9 Cir., 1952, 200 F.2d 8, the problem of the use of lists was discussed and, in that case this Court concluded:

> "It is clear that the list was issued and used solely as a guide to the draft boards so as to facilitate their consideration of classification problems that might come before them. It was not an inflexible standard." [13]

We believe this conclusion should be reached: Appellant was illegally deprived of consideration of his elected work choice by the local board. Therefore, the order to report on which the conviction is based was not in conformity with the established administrative process.

CONCLUSION

For the reasons given the judgment should be reversed.

Respectfully,

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Attorney for Appellant

February 9, 1968

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. Tietz, *Attorney*

APPENDIX

Plaintiff's Exhibits:	For Identification	In Evidence
1		6
Defendant's Exhibits:		
A	14	15
B	14	15